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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-659

W. RODNEY DEVILLIERS,

Petitioner,

v.

ATLAS CORPORATION,

Respondent.

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Opinions Below

The opinion of the Court of Appeals has been reported as *Atlas Corporation* v. *DeVilliers*, 447 F.2d 799 (10th Cir. 1971).

Jurisdiction

The petitioner fails to mention Rule 19, and the reasons, which fall within the rule, for the Supreme Court granting the Writ.

Questions Presented

The petitioner DeVilliers has mis-stated the question for review. The proceeding in the trial court was not for the "sole purpose" of aiding in collection of civil debt. The proceeding was to determine if petitioner should be held in contempt and fined for a wilful and intentional disobedience and resistance of the courts' lawful writ, process and order in accordance with 18 U.S.C. § 401(3).

Statement of the Case

The statement omits the details concerning the petitioner's conduct, which the opinion of the Circuit Court characterizes as "disgraceful". The highlights of his conduct are reviewed in the opinion. See 447 F.2d at 801-803.

Essentially, the facts are that the petitioner gave false information concerning his property and assets to a Deputy United States Marshal, who was serving a valid writ of execution. He concealed information concerning the ownership and location of specific items of property, including shares of stock in a corporation called "DeVilliers Nuclear Corporation". Petitioner thereafter disposed of or encumbered this stock thereby preventing the respondent from executing on it. Respondent filed a petition bringing these facts to the court's attention. A hearing was had on January 27, 1970, after which the court's order was entered on February 13, 1970. The court found that the respondent had sustained losses as a result of petitioner's conduct, and fined the petitioner the amount of the loss, plus attorney's fees. The fine in the amount of $150,000.00 was based on the value of the stock which petitioner had sold or encumbered. Respondent's judgment is actually in excess of $400,000.00 and, accordingly, the petitioner was not being ordered to jail for failure to pay this judgment.

The court ordered the petitioner to jail until the fine was paid to the Clerk of the Court, or until further order of the court. Any amounts received on the fine by the Clerk were to be turned over to the respondent in reduction of its judgment. The court also found that the petitioner had filed a sworn affidavit in the cause on December 1, 1969, in which he swore that at all times pertinent to the proceeding, he had disclosed assets of a value more than sufficient to satisfy respondent's judgment and, specifically, that his personal ownership in DeVilliers Nuclear Corporation had a market value in excess of "$1 Million Dollars". Petitioner's statement that the court's order was entered to aid respondent in collection of its judgment is erroneous. The Court of Appeals correctly held that the fine and alternate commitment to jail were within the prerogative of the court under the contempt statute, 18 U.S.C. § 401(3).

Argument

Petitioner erroneously states that the proceedings in the trial court had resulted in the petitioner being ordered imprisoned for debt. The same arguments were made and authorities cited by the petitioner in his appeal to the Court of Appeals. The cases cited, for the most part, involve bankruptcy proceedings. They approve the rule that a party may be imprisoned for contempt for failure to turn over funds or property belonging to the bankrupt estate. They recognize that it must be established that the party has possession of funds or property. The petitioner here, in effect, is contending that a fine imposed for a wilful and intentional disobedience and resistance to the writ of execution is actually an imprisonment for "debt" within the meaning of the New Mexico constitutional prohibition against imprisonment for debt. N.M. Const. Art. II § 21. The authorities cited, including the New Mexico decisions *In re Jaramillo*, 8 N.M. 598, 45 P. 1110 (1896), and *Ex parte Canavan*, 17 N.M. 100, 130 P. 248 (1912) do not support this position. In *In re Jaramillo* the court specifically reaffirmed its power to enforce decrees of contempt by imprisonment where the contemnor is able to comply. The Court also held that the constitutional provision prohibits incarceration of one who demonstrates his inability to comply. In *Ex parte Canavan* there was a finding that the contemnor had the ability to comply, thereby distinguishing the case from *Jaramillo*. In the present case the court found that based on statements in the petitioner's own affidavit, he had the ability to pay the fine and thereby avoid the imprisonment. Petitioner does not attempt to dispute this finding in the petition herein.

Imprisonment for failure to pay a contempt fine does not constitute imprisonment for debt. 17 Am.Jur.2d Contempt § 112 at 98; *Ex parte Robertson*, 27 Tex. App. 628, 11 S.W. 669 (1889); *In re Clift's Estate*, 159 P.2d 872 (Utah 1945); *Rudd* v. *Rudd*, 214 S.W. 791, 796 (Ky. 1919); *Watkins* v. *Rives*, 125 F.2d 33 (D. C. Cir. 1941); *Cutting* v. *Van*

Fleet, 252 F. 100 (9th Cir 1918). Further, the situation is not altered by paying the fine to Atlas in reduction of its prior judgment. *Raymor Ballroom Co.* v. *Buck,* 110 F.2d 207 (1st Cir. 1940). Atlas was entitled to losses sustained as a result of petitioner's conduct. *Munitions Carriers Conference, Inc.* v. *American Farm Lines,* 303 F. Supp. 1078 (W.D. Okla. 1969), *aff'd,* 440 F.2d 944 (10th Cir. 1971).

Furthermore, the underlying judgment in the present case does not constitute a "debt" within the meaning of the cited provision of the New Mexico constitution. The judgment in the case at bar is one for fraud. See *DeVilliers* v. *Atlas Corp.,* 360 F.2d 292 (10th Cir. 1966). A judgment for fraud is clearly ex delicto. See *Ex parte Milecke,* 52 Wash. 312, 100 P. 743, 745 (1909); *Nunn* v. *Smith,* 270 N. C. 374, 154 S.E.2d 497 (1967); and, generally, Dobbs, *Contempt of Court: A Survey,* 56 Cornell L.Rev. 183, 269-273 (1971).

It is generally held that a debt, which is covered by a constitutional provision like the one in New Mexico, must be a debt arising exclusive from actions *ex contractu,* and not from judgments *ex delicto.* See 16 Am. Jur.2d Constitutional Law § 388 at 727; *Ex parte Milecke,* supra; *Carter* v. *Lynch,* 429 F.2d 154 (4th Cir. 1970).

The power of a court of general jurisdiction to punish for contempt for disobedience of its lawful orders is inherent. *In re Rosser,* 101 F. 562, 564-565 (8th Cir. 1900). In addition, Congress specifically gave this power to the federal courts by 18 U.S.C. § 401.

Common sense dictates that a defendant found liable for fraud in converting funds to his own use ought not be permitted to defraud the process of the court by contumaciously resisting a writ of execution on the fraud judgment and avoiding payment of the resultant contempt fine without fear of the imprisonment sanction. To so restrict the equitable powers of our courts would, in effect, render meaningless the process issuing therefrom.

Conclusion

The petition should be denied.

Respectfully submitted,

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PETITION FOR REHEARING

on

Petition for Writ of Certiorari to the United States Supreme Court

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